STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: D. Holbrook, H. Hood, R. Griffin

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v

PAUL LEWIS PHILLIPS, JR.,

Defendant/Appellee.

Supreme Court No. 119429
Court of Appeals No: 230811
Saginaw Circuit Court
No: 00-18277-FC-1

APPELLEE BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Defendant/Appellee agrees that the Plaintiff/Appellant has set forth a proper basis for jurisdiction for in this Court.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. DOES MCR 6.201 OR MCL 767.94a ALLOW THE TRIAL COURT TO COMPEL CREATION OF A REPORT FROM A PROPOSED DEFENSE EXPERT?

Trial Court Answered	"Yes"
Court of Appeals Answered	"No"
Plaintiff/Appellant Answered	"Yes"
Defendant/Appellee Answered	"No"
Amicus Curiae Answered	"Yes"

II. DOES MCR 6.201 CONTROL DISCOVERY IN A CRIMINAL CASE?

Trial Court Did Not Consider	
Court of Appeals Would Answer	"Yes"
Plaintiff/Appellant Answered	"Yes"
Defendant/Appellee Answered	"Yes"
Amicus Curiae Answered with a qualified	"Yes"

III. DOES MCR 6.201 AUTHORIZE A TRIAL COURT TO COMPEL DISCLOSURE OF A DEFENSE?

Trial Court Did Not Consider	
Court of Appeals Did Not Consider	
Plaintiff/Appellant Answered	"Yes"
Defendant/Appellee Answered	"No"
Amicus Curiae Answered	"Yes"

IV. DOES MRE 705 GIVE THE TRIAL COURT DISCRETION TO ORDER DISCLOSURE OF A DEFENSE EXPERT'S OPINION?

Trial Court Did Not Consider	
Court of Appeals Did Not Address	
Plaintiff/Appellant Answered	"Yes"
Defendant/Appellee Answered	"No"
Amicus Curiae Answered	"Yes"

V. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ITS DETERMINATION OF "GOOD CAUSE"?

Trial Court Would Answer	"No"
Court of Appeals Did Not Consider	
Plaintiff/Appellant Answered	"No"
Defendant/Appellee Answered	"Yes"
Amicus Curiae Answered	"No"

COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. SUBSTANTIVE FACTS

On November 6, 1999, Paul Lewis Phillips, Jr., and friends Mike McFellin, Andrew Stamper and Michael Talkington met with plans to go to the Michigan State/Ohio State football game. The facts surrounding the friends' trip to the football game, consumption of alcohol, and their activities after the football game provide the factual basis surrounding this litigation.

Testimony presented at the preliminary examination support the alcohol consumption of Phillips and his friends. All four friends provided funds to purchase the alcohol. Phillips was provided alcohol by his friends, even though they knew he was a minor and could not legally drink. The activity of the friends started long before the football game and continued until late in the evening. The friends stopped at a bar after the game and then went to a friend's house. Michael Talkington and Paul Phillips left the house to buy more alcohol. Who was driving remains a question. It was during this trip that Phillips and Talkington were involved in a single motor vehicle accident causing injuries that lead to the death of Michael Talkington. Phillips was charged in a Felony Complaint for murder in the second degree; or in the alternative, OUIL causing death, alternative to manslaughter, motor vehicle for the death of his friend, Michael Talkington. It was from this accident that the charges against Paul Lewis Phillips arose.

B. PROCEDURAL FACTS

Prior to charges being filed, an accident report was prepared. Plaintiff/Appellant produced this report in response to Phillips' request for discovery.

On February 28, 2000, Plaintiff/Appellant filed a Request for Discovery requesting:

> "1. The name and address of each witness other than the defendant whom the defendant intends to call at trial.

2. A copy of any written or recorded statement by a lay witness whom the defendant intends to call at trial.
3. Any report of any kind produced by or for an expert witness whom the defendant intends to call at trial.
4. Any document, photograph, paper or tangible object that the defendant intends to offer in evidence." See, App at 7a.

This document did not request the creation of expert reports not in existence, but rather (consistent with the current court rule) requested any existing report "...of any kind produced by or for an expert witness whom the defendant intends to call at trial." Id. At the time of the request, the Preliminary Examination transcript was not available. Items 1, 2 and 4 have not been disputed by Plaintiff/Appellant. At the time of the request for discovery, no report of any kind had been produced by or for any of Phillips' experts (item 3 above). A listing of witnesses by Mr. Phillips was made on April 3, 2000. See, App at 2a. The preliminary examination was heard on February 3, 2000, although the transcript was not available until June 21, 2000. No "opinion" of any kind could have been formulated until after this date. Mr. Phillips filed a Response to People's Request for Discovery on March 28, 2000 listing six lay witnesses providing the cities they reside and listing two experts with their addresses. See, App at 4b-5b. Mr. Phillips provided as much information as was available concerning the lay witnesses and the addresses of the experts named. Id.

Plaintiff/Appellant filed a Motion to Strike Defense Witnesses. See, App at 9a-10a. Paul Phillips responded to the motion by arguing that he had complied with the provisions of MCR 6.201 and by claiming that Plaintiff/Appellant had not provided addresses for the witnesses listed an that Plaintiff/Appellant had failed to comply with discovery requests pursuant to MCR 6.201. See, App. 6b-7b.

The Trial Court's response to this motion adjourned a Trial date. The Court did not determine that Phillips failed to produce any item requested, but rather, required production after

the preliminary examination transcript was available, of any and all reports created by or for his experts. See, App. at 11a. This Order did not require Defendant to create reports not in existence.

Plaintiff/Appellant received Defendant's Second Response to People's Request for Discovery on July 27,2000. See, App. at 12a. Addresses were provided for all witnesses listed. No new lay witnesses were added to the earlier Response. One additional expert was listed. Compare: App. at 4b-5b with 8b-9b.

On August 25, 2000, the Plaintiff/Appellant filed a Motion to Adjourn Trial and a Motion to Strike. See, App at 1b-3b. At that time, trial was scheduled for September 19, 2000. Id. The Motion to Adjourn Trial listed several reasons for postponement. See, App at 2b-3b. Plaintiff/Appellant did not claim that the listing of witnesses, addresses on July 27, 2000 was a basis to adjourn the upcoming trial. Id. The request for adjournment was made because the Prosecutor was scheduled for trial on the same day in front of another judge. Id. The Prosecutor's argument before the Trial Court for adjournment was also based upon the conflicting trial schedule. See, App at 19a-22a. The Prosecutor did not mention the timing of the receipt of witness addresses from Paul Phillips and did not mention the dispute concerning expert reports. Id. The Trial Court granted the Motion to Adjourn Trial before the issue of producing expert reports was considered. See, App at 22a.

After the Motion to Adjourn and the after Trial Court moved the Trial to an unknown date, the Trial Court considered the Motion to Strike. See, App at 23a. The Plaintiff/Appellant did not allege violation of the previous Court Order. See, App at 14a-16a. Plaintiff/Appellant did not file a Brief in Support of its Motion to Strike but rather, raised several cases at the hearing. Paul Phillips was not provided these citations until the hearing and thus could not address the cases at the hearing. Plaintiff/Appellant basically argued that the court rule and

statute compelled Paul Lewis Phillips, Jr. to **create** expert reports for production to the prosecution. See, App at 23a-26a. No mention was made by the Prosecutor that the timing of receipt of witness addresses had caused any problem with his case preparation or discovery. Id.

Following the hearing on September 5, 2000, an Order was prepared by Plaintiff/Appellant. This Order was signed by the Trial Court Judge on September 11, 2000. See, App at 32a. Paul Phillips was not notified of the presentation of the Order and was not provided a copy of the Order until after October 16, 2000. No Proof of Service or Notice of Presentation is listed in the Circuit Court docket entries. See, App at 3a. On October 5, 2000, Paul Phillips, filed a Motion for Reconsideration as he had not received a copy of the Court's Order. The Trial Court issued an Opinion and Order denying Defendant's Motion for Reconsideration on October 20, 2000. See, App at 33a-35a. In the Opinion and Order of the Court denying Defendant's Motion for Reconsideration, the Trial Court found that the cases cited by Plaintiff/Appellant, i.e. People v Burwick, 450 Mich 281; 537 NW2d 813 (1955); People v Wimberly, 384 Mich 62 (1970); 179 NW2d 623; and Taylor v Illinois, 484 U.S. 400; 108 S CT 646i; 98 L.Ed. 2d 798 (1988), did not apply to the current factual situation. See, App at 35a. Clearly, the Trial Court did not base its original determination upon a finding Paul Phillips had violated any Order of the Court or had acted to interfere with Plaintiff/Appellant's discovery. The Trial Court based its original determination solely on its discretion created by MCL 767.94a and MCR 6.201.

Appeal was taken to the Court of Appeals by way of Application for Leave to Appeal, which was granted. On May 25, 2001, the Court of Appeals, through a published Opinion reversed the Trial Court based upon two determinations. See, App at 40a-41a. First, the Court of Appeals found that the Trial Court erred in its interpretation of MCR 6.201 as allowing the

Trial Court to compel the creation of an expert report. Secondly, the Court of Appeals reversed the Trial Court's Opinion because the Trial Court:

> "did not show why good cause existed and apparently did not base its decision on good cause modification but rather on the Trial Court's discretion. The Trial Court abused its discretion in compelling Defendant to create expert reports where non existed because the Prosecutor was not entitled to the disclosure" Id.

In June of 2001, Plaintiff/Appellant filed an Application for Leave to Appeal to this Court. In October of 2001, this Court remanded the case for a "good cause determination under MCR 6.201(I)" to the Trial Court. See, App at 38a-39a, 42a.

In February of 2002, the Trial Judge issued an Opinion and Order regarding good cause. See, App at 43a-47a. The "good cause" noted by the Trial Court as allowing modification of MCR 6.201(A) was the failure by Mr. Phillips to produce measurements and photographs and the failure to provide expert witness addresses as required by MCR 6.201(f). Id at 46a-47a. The record demonstrates no effort to determine if the photographs were to be offered at Trial. It is clear from the record that the measurements had not been reduced to writing. Finally, the record demonstrates that the addresses of the experts at issue had been provided to Plaintiff/Appellant in Phillips' initial response to discovery file April 3, 2000. See, App. at 2a and 4b-5b. There is no indication on the record that the Plaintiff/Appellant had suffered any harm in either trial preparation or in discovery because witness addresses were not available until July 27, 2000. Id. The expert addresses were provided on March 28, 2000.

On July 10, 2002, this Court granted the Plaintiff/Appellant's Application for Leave to Appeal and noted that among the issues to be briefed are:

> Whether MCR 6.201 or MCL 767.94a allows a Trial Court to compel creation of a report from a proposed defense expert witness?
>
> Whether the court rules authorizes a Trial Court to compel disclosure of a defense?

Whether the court rule, MCR 6.201 or the statute, MCL 767.94a controls discovery in criminal cases?

Whether MRE 705 gives the Trial Court discretion to order disclosure of a defense experts opinion?

See, App at 48a.

STANDARD OF REVIEW

This Court reviews lower Court interpretation of MCR 6.201 and MCL 797.94(a) de novo. Bruwer v Oaks, (On Rem) 218 Mich App 392, 397; 554 NW2d 345 (1996); and Markillie v Livingston Rd Comm'rs, 210 Mich App 16, 21; 532 NW2d 878 (1995).

The interpretation of court rules are subject to the same basic principles that govern statutory interpretation. Bush v Beener, 224 Mich App 457, 461; 569 NW2d 636 (1997); People v Gilmore, 222 Mich App 442, 449; 564 NW2d 158 (1997); Saint George Greek Orthodox Church v Laupmanis Assoc, 204 Mich App 278; 514 NW2d 516 (1994); and People v Blount, 189 Mich App 643, 648; 473 NW2d 792 (1991). When interpreting a statute or court rule, the Court must first and foremost give affect to the intent of the body creating the legislation or court rule. Tyre v Michigan Veteran's Facility, 451 Mich 129, 135; 545 NW2d 642 (1996); People v Hawkins, 181 Mich App 393, 396; 448 NW2d 858 (1989); and Joy Management Co v Detroit, 176 Mich App 722, 730; 440 NW2d 654 (1989). The first criterion in determining intent is the specific language of the court rule or statute. Laupmanis Assoc, supra, at 282; Hawkins, supra, at 396. The creating body is presumed to have intended the meaning it plainly expressed. Trye, supra; and Fraiser v Model Coverall Service, Inc, 182 Mich App 741, 744; 453 NW2d 301 (1990). Courts may not speculate with respect to the probable intent of the Legislature beyond the words expressed in the statute. If the plain and ordinary meaning of the court rule or statute is clear, judicial construction is normally neither necessary nor permitted. Trye, supra; and Nat'l Exposition Co v Detroit, 169 Mich App 25, 29; 425 NW2d 497 (1988).

In the instant case, the Trial Court determined that it had discretion pursuant to MCR 6.201 and MCL 767.94a to order the creation of expert reports by Defendant/Appellant. An abuse of discretion exists were an unprejudiced person considering the facts on which the Trial Court acted, would say that there was no justification excuse for the ruling. People v Laws,

supra, at 455; People v Milton, 186 Mich App 574, 575-576; 465 NW2d 371 (1990); rem on other grds, 438 Mich 852 (1991).

ARGUMENT

I. MCR6.201 AND MCL 767.94a DO NOT ALLOW A TRIAL COURT TO COMPEL CREATION OF A REPORT FROM A PROPOSED DEFENSE EXPERT

The United States Supreme Court made it clear that reciprocal discovery obligations are subject to Constitutional due process limitations, in that discovery is Constitutional only when a defendant is required to disclose information that the defendant would disclose at trial and wherein a prosecution is also required to produce the same discovery. Williams v Florida, 399 U.S. 78, 85; 90 S.Ct. 1893; 26 L. Ed. 2d 446 (1970); and Wardius v Oregon, 412 U.S. 470; 93 S.Ct. 2208; 37 L. Ed. 2d 82 (1973). The Court in Wardius determined that fundamental fairness required full reciprocal discovery by the State of any requirement placed upon a criminal defendant. 412 U.S. at 472. The Court noted:

> "...it is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." Id at 476.

The Wardius Court also recognized that "the state's inherent information gathering advantage suggested that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." Id at 475 n.9.

In Michigan, before the promulgation of MCR 6.201, discovery in criminal cases was entrusted solely to the discretion of the Trial Court. Several panels of the Court of Appeals reached differing conclusions concerning whether the prosecutor would be allowed any discovery of information known to the defense. People v Lemcool, 445 Mich 491; 518 NW2d 437 (1994). Compare: People v Johnson, 168 Mich App 581; 300 NW2d 332 (1998); People v Tronti, 176 Mich App 544; 440 NW2d 62 (1989); and People v Paris, 166 Mich App 276; 420 NW2d 184 (1980). Following the enactment of MCR 6.201 an effort was made to meet the

requirements set forth by the United States Supreme Court. MCR 6.201(A) requires exact, corresponding, reciprocal discovery. MCR 6.201(C) contains specific limitations on discovery requests that might otherwise be enforceable.

In the instant case, while the Trial Court relied upon MCL 767.94a and MCR 6.201 to support its determination, both the Saginaw County Prosecutor and Paul Phillips have taken the position that Michigan discovery procedures in criminal cases are governed by MCR 6.201. See, Brief On Appeal – Appellant at 21 and 35-36; Const 1963, Art 6, §5; and Administrative Order No: 1994-10. See also, People v Sheldon, 234 Mich App 68, 70-71; 592 NW2d 121 (1999). The court rule was the focus of both the People and Phillips before the Court of Appeals. The Amicus Appeal Brief raises the question that the Supreme Court exceeded its authority in adopting Administrative Order No.: 1994-10. See, Brief of Prosecuting Attorney Association at 9.

To the extent MCL 767.94a is the basis of the Trial Court's opinion (as opposed to the court rule) the statutory provision and the court rule are similar in mandated discovery of expert reports from the defendant in a criminal action. The statute does not require an attorney for the defendant in a criminal action to create expert reports for production to the State. To the extent that the statute requires production of materials or information not required from the prosecutor, it would not meet the requirements set forth by the United States Supreme Court in Wardius v Oregon, supra, concerning reciprocal discovery. It is only when the statute is read together with the court rule that the Constitutionally protected requirements of reciprocal discovery on the part of the prosecutor are effectuated.

The statutory requirement that a defendant produce any "material or information" concerning "the nature of any defense the defense intends to establish at Trial by expert testimony" is not required of the prosecutor either by court rule or by the statute. Clearly, a

requirement that the Defendant produce this type of material independent of a reciprocal requirement concerning production on the part of the prosecution is not permitted. See, Wardius v Oregon, supra. Further, if the statute is read instead of the court rule, the statute itself does not contain the Constitutional and procedural protections placed upon criminal discovery by this Court through MCR 6.201(C).

The liberal discovery allowed by Michigan Courts in civil litigation has not been applied in the criminal context. MCR 6.001(D)(3) specifically provides rules of civil procedure do not apply in the following circumstances:

> (1) as otherwise provided by rule or statute,
> (2) when it clearly appears that they apply to civil actions only, or
> (3) when a statute or court rule provides a like or different procedure.

Criminal discovery procedures have been specifically created in MCR 6.201 are clearly different than those allowed in civil cases. Criminal discovery procedures meet the exception created by MCR 6.001(D)(3).

Both the court rule and statute allow only limited discovery in criminal cases. See, MCR 6.201 and MCL 797.94a. The criminal procedures must be compared to the broad discovery allowed in civil cases. In the criminal context, specific mandatory disclosure from both parties is contained in MCR 6.201(A). A broad class of possible discovery is completely foreclosed by MCR 6.201(C). The limited discovery allowed in criminal cases must be juxtaposed with the exceedingly broad discovery allowed in civil cases. MCR 2.302 allows discovery of "any matter" that is not privileged, but relevant to the subject matter involved in the litigation. Under current procedure, civil discovery is allowed in any matter that may lead to the production evidence admissible at trial. Michigan has a long history of commitment to far reaching and open discovery practices in civil litigation. See, Daniels v Allen Industries, Inc, 391 Mich 398,

403i; 216 NW2d 762 (1974) and Domako v Rowe, 438 Mich 347, 359i; 475 NW2d 30 (1991). In a civil case, discovery through requests to admit, interrogatories and notice to produce are allowed. See, MCR 2.309, MCR 2.310 and MCR 2.312. No such mechanisms are permitted in the criminal context. MCR 2.306 allows broad discovery through depositions on oral examination. Again, no such mechanism is provided in the criminal context.

The distinction between criminal discovery procedures and civil discovery procedures are carried forward in the context of discovery permitted of expert opinions. In criminal cases, the court rule addresses only existing reports produced by or for an expert intended to be called at Trial. See, MCR 6.201(A)(3). The statute also focuses on existing reports or statements "...that the defendant intends to offer in evidence..." or were created by or for a person that the defendant intends to call as a witness. MCL 797.94a(i)(c). Plaintiff/Appellant requested discovery material pursuant to the court rule. See, App at 7a-8a. The limited production of both court rule and statute must be compared with the broad discovery allowed concerning experts in civil cases. MCR 2.302(B)(4) has extensive procedures that set forth liberal requirements allowing a party to compel another party to produce an expert's opinion. Interrogatories and depositions are allowed. No such provisions are contained within either MCR 6.201 or MCL 797.94a. This distinction has to be reviewed as intentional.

In setting the boundaries of reciprocal discovery, neither statute nor court rule establish a burden upon a criminal defendant to **create** reports or statements **for the sole purpose of producing the documents to assist the State in its efforts to obtain a conviction**. There is no suggestion that the burden of proof placed on the State to "go forward" has been changed by the limited reciprocal discovery allowed. While there is a limited obligation on a criminal defendant for limited reciprocal discovery, the discovery allowed focuses upon materials intended to be introduced at Trial and materials **already existing and in the possession of the defendant**.

Neither statute nor court rule suggest that a criminal defendant has an obligation to create documentary material to be used against him or her. It must be assumed that this omission was intended. Both statute and court rule set forth the items that are included in reciprocal discovery. As noted above, this is particularly true when compared to MCR 2.302(B)(4). MCR 6.201(A)'s mandatory disclosure focuses on written or recorded statements of lay witnesses and reports prepared by or for an expert witness. Again, the focus is clearly on witnesses or evidence that will be called or produced at trial. Neither provision suggested that a defendant is required to create a statement or produce a written report for the sole purpose of production to the opposing party for use against the creating party. This reading of the statute and court rule is supported by maxim expressio unius est exclusio alterius, that the express mention of one thing implies the exclusion of similar things. See, People v Sheldon, supra, 234 Mich App at 70.

The limited provisions of the statute and the court rule must also be compared with the specific requirements of MCL 768.20a(6). In that statute, the Legislature determined that specific expert reports should be created under particular factual situations and it provided specifically for the creation and contents. No such requirements are contained within MCL 797.94a. The difference between the provisions must be viewed as intentional and must be honored.

The limited nature of discovery allowed through Michigan criminal procedures is also demonstrated by a comparison to Federal Criminal Procedures. Pursuant to FR Crim P 16, the type of report involved in the instant case (a summary created by or at the direction of an attorney) is allowed. See, F.R. Crim. P. 16(a)(1)(G) and (b)(1)(C). MCR 6.201(A) and MCL 797.94a do not contain corresponding provisions. Under Federal procedure, both parties are required to generate the summaries and could not be required of only the defendant as the

prosecutor is required to make the first production at the request of the defendant. See, F.R. Crim. P. 16(a)(1)(E) and (b)(1)(C). Federal procedure would not allow the discovery at issue in this case unless and until the Prosecutor had generated a written summary. See, F.R. Crim. P. 16(b)(1)(A).

The issue of whether MCR 6.201(A)(3) allows a Circuit Court to compel creation of expert reports by a criminal defendant has not received direct review by Michigan Appellate Courts. In People v Elston, 462 Mich 751, 762; 614 NW2d 595 (2000), the court rule was considered when a defendant challenged non-production of evidence and an expert opinion first made available by the Prosecutor during the Trial resulting in conviction. In dicta, the majority noted:

> Apart from the wet swab sample and the wet swab laboratory report, the only other "evidence of sperm" not disclosed to defendant before trial was Dr. Randall's own personal observations. Clearly, this information was out side the scope of discovery. Because Dr. Randall did not make notes of his observations, they were not subject to mandatory disclosure under MCR 6.201(A)(3). Dr. Randall's personal observations of sperm were not otherwise discoverable because evidence of sperm recovered from the victim was not "exculpatory" under MCR 6.201(B)(1), or "favorable to an accused" under Brady v [Maryland, 373 U S 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963)].

From this determination, it is clear that a majority of this Court (the dissent did not address this point) did not believe "observations" as opposed to notes created to memorialize the observations by an expert, were required to be produced by MCR 6.201(A)(3). Where no note or report existed from an expert, the prosecutor was under no obligation to contact the expert, seek the information in question, or seek the creation of a report. If the prosecutor in Elston would have been under the duty to produce what is promoted by the People in this case, the prosecutor in Elston would have been required to contact his expert concerning the various elements of his case and to produce written reports concerning those opinions for which documentation was not

produced. The required production in the instant case is similar to the materials noted by this Court as not falling within the terms of MCR 6.201(A)(3).

The Court of Appeals has reviewed the application of MCR 6.201(A)(2) in People v Holtzman, 234 Mich App 166; 593 NW2d 617 (1999). The Court acted to protect the thought process and work product of the prosecutor. The issue was whether a Prosecutor's notes of an interview with a witness constituted a "statement" within the terms of the court rule for the purpose of mandatory disclosure. The Court refused to apply a broad definition of the term "statement" and instead, turned to MCR 2.302(B)(3)(c) which defines "statement" as a written document adopted by the person making the statement or a recording of the statement. Because the notes sought did not fall within this definition, production was not required.

The approach of the Holtzman Court should be applied in the instant case regarding the interpretation of MCR 6.201(A)(3). The word "report" suggests an existing document produced by or for an expert. The report that was available was produced. Otherwise, no "report" or other such document exists. The plain language of the court rule should be applied. If creation of a report concerning an expert's opinion had been envisioned, it would have been noted specifically. The Trial Court misinterpreted MCR 6.201(A)(3) to create an affirmative obligation on the part of a criminal defendant to create materials that have no purpose other than to obtain conviction. The Court of Appeals properly interpreted the court rule and statute and should be affirmed.

Several other cases from the Court of Appeals review the application of MCR 6.201 and support Paul Phillips' position that the Trial Court improperly ordered the creation of expert reports. In the criminal context, the prosecutor is required by both Statute and Court rule to provide broader discovery than is the defendant. People v Tracey, 221 Mich App 321; 561 NW2d 133 (1997) considered whether the prosecutor was required to disclose an unrecorded

statement under MCR 6.201. In Tracey, supra, the night before trial oral statements were made to the prosecutor that were not written or recorded. 221 Mich App at 323-324. In that case, the Court determined that the prosecution was under "no obligation" to disclose unrecorded statements to the defendant before the trial under MCR 6.201. Id at 324. Clearly, if the prosecution was under no obligation to create witness statements for production, Tracey should be applied in the instant case to deny the prosecutor's request.

A similar finding was reached in People v Holtzman, supra, where a defendant attempted to compel production of a prosecutor's notes concerning interviews of witnesses to be called at trial. In Holtzman, the Court determined that the prosecutor's notes did not fall within the requirements of MCR 6.201 and were not required to be produced. Finally, in People v Gilmore, supra, a criminal defendant attempted to compel production of the prosecutor's disposition record. The defendant argued that production was necessary to allow proper cross-examination of witnesses the prosecution intended to call at trial. Again, the Court of Appeals did not apply the broad discovery requested by the prosecutor in the instant case and ruled that the disposition record was not within the items required to be produced pursuant to MCR 6.201. These cases apply in the instant matter and demonstrate that the terms of MCR 6.201 have not been broadened to create discovery rights broader than the limited reciprocal discovery set forth in the court rule. The court rule does not place a burden on either party to create documents or other materials solely for the purpose of assisting the opposing party in its Trial preparation. The court rule allows broader discovery by a criminal defendant from the People than is provided the Prosecutor against the charged individual. If discovery within this broader context was not allowed in Tracey, Holtzman and Gilmore, it should not have been allowed in the more limited context involved in this case.

In the instant case, MCR 6.201(C)(1) applies to require the refusal of the prosecutor's request. The statute does not contain a similar provision, although the prohibition must be assumed to apply. MCR 6.201(C)(1) attempts to balance limited reciprocal discovery required of a criminal defendant with the individual rights guaranteed each citizen by both the Constitution of the United States and the Constitution of Michigan. MCR 6.201(C)(1) specifically provides that there is no right to discover information or evidence protected from disclosure by the Constitution, statute, or privilege, and specifically shields a defendant from producing materials such as the report requested by the prosecutor. Paul Phillips named lay and expert witnesses and provided an existing report created by one of his experts. The Prosecutor was provided the curriculum vitae of the experts. The objection in this case relates to the Order compelling Mr. Phillips to affirmatively create reports for the sole purpose of producing the reports to the prosecutor to assist in an attempt to obtain a conviction. No similar obligation has been placed on the prosecutor. The prosecution in the instant case produced reports created immediately after the accident in November of 1999. The Prosecutor was not required to contact expert withesses after litigation had been initiated to create a report. The report the Prosecutor produced did not have input from the Prosecutor.

The Trial Court has placed an obligation on Paul Phillips to assist the prosecutor in the State's efforts to convict him. The People have the burden to prove the elements of the charged criminal offense. See, In re: Winship, 397 U.S. 358; 90 S. Ct.1068; 25 L. Ed. 2d 368 (1970). The Trial Court's Orders will have the effect of lessening the People's burden to prove its case in chief. The Trial Court's action of ordering the production of materials not in existence at the time of the hearing impermissibly shifts the burden of proof to Paul Phillips. The Defendant/Appellee has no burden to go forward in the instant case. To the extent Paul Phillips is compelled to participate in the creation of the case against him, his due process rights created

by the Constitution of the State of Michigan and the Constitution of the United States have been violated. The Trial Court's Orders create a burden on Paul Phillips that is not recognized by statute, court rule or case law.

The Trial Court's Orders violate Paul Phillips' right against self-incrimination by requiring that he affirmatively create reports that have no purpose other than to be used against him. The reports will be produced at the Defendant/Appellee's initiation and will reflect the thought processes of Phillips' attorney, together with his plans of defense to be mounted against the State's charges. The People have no right to access the thought processes of Paul Phillips' attorney. The Trial Court's Orders also interfere with Paul Phillips' Sixth Amendment compulsory process clause rights. See generally, Chambers v Mississippi, 410 U.S. 284; 93 S. Ct. 1038; 35 L. Ed. 2d 297 (1973); and Washington v Texas, 388 U.S. 14; 87 S. Ct. 1920; 18 L. Ed. 2d 1918 (1967). The decision to employ particular portions of a case or a defense rests solely with the defendant and the Trial Court's Orders interfere with this right by compelling production of defense theories before the defendant has had an opportunity to hear the case made by the prosecution.

The Trial Court's Opinion violates the Attorney Work Product Doctrine by requiring Paul Phillips' attorney to effectuate the creation of materials that will be used by the opposition in preparation of the case against him. The Doctrine has been implicitly incorporated into MCR 6.201. Holtzman, supra, 234 Mich App at 181. As the documents to be produced will be created at the initiation of Paul Phillips' attorney, the documents will impermissibly reflect the attorney's thought processes, plans of defense for Trial and Trial preparation. The prosecution has not been compelled to produce this type of information and should not be allowed this insight into Paul Phillips' case.

The issues presented in the instant case have not received wide review nationwide. Several appellate courts from other jurisdictions reviewing reciprocal discovery statutes and/or court rules similar to Michigan have held that where the statute or court rule did not specifically require a creation of written opinions of experts, the Defendant should not be compelled to create reports for production. See, State v Hutchinson, 111 Wash 2d 872, 766 P 2d 447 (1989); and People v Purdon, 175 Misc 2d 775; 669 NYS 2d 777 (1997). Compare: People v Hummel, 38 Ill App 3d 233; 347 NE 2d 305 (1976), applying a similar finding in favor of the Prosecutor. In these cases, reciprocal discovery was applied strictly as contained in the court rules or statutes. The reviewing Courts refused to expand reciprocal discovery to force a criminal defendant to create expert report for use by the State.

II. MCR 6.201 CONTROLS DISCOVERY IN A CRIMINAL CASE

Reciprocal discovery in a criminal case is created by MCR 6.201. Subpart (A) provides procedure for disclosure by both parties. MCL 767.94a does not provide for reciprocal discovery in that its terms apply solely to production by the defendant in a criminal action at the request of the prosecutor. The court rule was adopted by this Court in November of 1994 and became effective January 1, 1995. The court rule itself was amended in 1996 and again in 1998 without question of the basic premise of Administrative Order No. 1994-10 that MCR 6.201 governed criminal discovery and not MCL 797.94a. The enactment of MCR 6.201 followed the Court's determination in Lemcool, supra, and the enactment of MCL 767.94a. In conjunction with the issuing of MCR 6.201, this Court issued Administrative Order No. 1994-10. The Administrative Order relied upon MCR 1.104 and Const 1993, Art 6, §5. Further support for the position of Administrative Order No. 1994-10 can be found in MCL 600.223(2)(j) and (k) where the Legislature has recognized this Court's authority to promulgate and amend the General court rules governing discovery procedures and other matters at its discretion. Finally, it must be noted that the Legislature itself has not acted to modify the rules and procedures created by MCR 6.201 following the issuance of Administrative Order No. 1994-10. In the instant case, both parties have taken the position that the Statute is superceded by the Court rule under this Court's authority to provide for the rules of practice. See, Brief on Appeal – Appellant at 24 and 35-36.

III. MCR 6.201 DOES NOT AUTHORIZE A TRIAL COURT TO COMPEL GENERAL DISCLOSURE OF DEFENSES IN A CRIMINAL CASE

In Michigan, it is a fundamental axiom of the law that a person accused of the violation of a criminal law is presumed to be innocent until proven guilty beyond a reasonable doubt. People v Compian, 38 Mich App 289; 196 NW2d 353 (1972); and People v Rosen, 18 Mich App 457; 171 NW2d 488 (1969). An arrested person is presumed innocent of the offense charged. This presumption is real and ought not be ignored nor taken lightly. This presumption of innocence must be applied consistently. People v Hudson, 29 Mich App 285; 185 NW2d 134 (1970); rev'd 386 Mich 665; 194 NW2d 329 (1972). The presumption applies to each and every element of the offense charged. Morissette v U.S., 342 U.S. 246; 72 S.Ct. 240; 96 L. Ed. 288 (1952). Generally, the burden of proof is on the prosecution to establish guilt of an accused beyond a reasonable doubt to every element of the crime charged. People v Rios, 386 Mich 172; 191 NW2d 297 (1971). In Michigan, a general denial on behalf of a defendant in a criminal trial is a sufficient response to the charges made by the prosecutor. Michigan has no requirement that would place the burden upon the Defendant to affirmatively deny each of the elements charged. A blanket requirement that a defendant in a criminal case be forced to disclose defenses would improperly require specific responses to the allegations made.

MCR 6.201 does not list a criminal defendant's defenses as a matter for mandatory disclosure. Such a requirement was considered when this Court originally considered formalization of discovery in criminal cases. See, Proposed Subchapter 6.200 of the Michigan Court Rules, 422A Mich 79. After extensive review, this requirement was not included in the finalized court rule. Compare: MCR 6.201(A). There are no other provisions of the court rules that would apply a general requirement that a criminal defendant's defenses be discoverable. Similarly, there are no requirements that would compel a comparable disclosure from a

Prosecutor. MCR 6.001 would apply the criminal discovery rules as opposed to those present in the civil context. As noted earlier in this brief, civil discovery is much broader than criminal discovery. Court rules allowing a general right to compel parties to set forth their positions in the litigation would not apply to discovery specifically controlled by MCR 6.201. The discovery required by or from the prosecutor in MCR 6.201(A) and (B) does not include any reciprocal requirement that the prosecutor provide similar information to each element of a claim. Only to the extent that specified exhibits fall within the various provisions of MCR 6.201(A) or (B), are the people required to provide specific information concerning the various elements of the charges made. Similarly, there are no requirements contained within MCR 6.201(A) to require the Defendant in a criminal trial on a continued basis to waive his/her right to making a general response. Clearly, such a reading of the rule would, in every case, require that the Defendant in a criminal action specifically set forth the defenses known against him. Any requirement that a Defendant disclose defenses must also be applied to require a similar disclosure from the prosecution. See, Wardius v Oregon, supra.

This reading of the present Court rule is supported by the limited exceptions that exist requiring disclosure of a defense in a criminal case. The Legislature has not acted after Administrative Order 1994-10 to supplement or change the mandatory discovery created by MCR 6.201(A). The Legislature has acted concerning several specified defenses to require defendant to provide notice. These defenses include an alibi defense, an insanity defense, and duress as a defense to prison escape. See, MCL 768.20; MCL 768.20a; and MCL 768.21b. Additionally, this Court has acted in specific instances to require the Defendant to provide notices of a defense. In People v Vandervliet, 44 Mich 52 (1993); 508 NW2d 114 (1993). This Court reviewed discovery and admission of other crimes or wrongs evidence. This Court noted in the "extraordinarily difficult context" of this type of evidence that specific discovery

requirements would be developed. This Court required the prosecution to provide notice of its intent to introduce other acts evidence at trial, and following notification, allowed the Trial Court to require Defendant to provide a theory or theories of defense. Id. Again, it must be emphasized that the requirement to provide a defense applied only in the circumstance then under examination and because of the extremely difficult issues raised by the introduction of the evidence at issue. Further, the requirement to provide a defense was fully reciprocal upon both parties.

IV. MRE 705 DOES NOT ALLOW THE TRIAL COURT DISCRETION TO ORDER THE CREATION OF A DEFENSE EXPERT'S OPINION

MRE 705 is not a discovery provision, but rather a rule that relates to the matter of presenting testimony at trial. MRE 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

As noted earlier, interpretations of court rule are subject to the same basic principles that govern statutory interpretation. See, Bush v Beamer, supra; People v Gilmore, supra and St. George Greek Orthodox Church, supra. A body creating the rule or statute is presumed to have intended the meaning of the words it expressed. See, Tyre, supra, and Frasier v Modell Coverall Service, Inc, supra. Similarly, words used within a rule of evidence are to be given their ordinary meanings. People v Johnson, 100 Mich App 594, 598; 300 NW 2d 332 (1980). The rules of evidence must be read in conjunction with the court rules. MRE 702, 703 and 705 deal specifically with testimony by experts at trial. Discovery relating to expert opinions is specifically provided for through MCR 6.201 in the criminal context and MCR 2.302(B)(4) in the civil context. No portion of MRE 705 indicates that this rule was intended to supplement or replace the discovery provisions created in the Michigan Court Rules. Clearly, no provision of MRE 705 demonstrates an intent to change discovery in criminal cases as established by MCR 6.201.

In the instant case, MRE 705 was not raised by the prosecutor in his Motion to Strike. See, App at 14a-16a. Further, MRE 705 was not raised by the prosecutor at the hearing on the Motion to Strike. See, App at 23a-30a. Trial Court did not rely on MRE 705 in either its Order and its Opinion and Order of the Court Denying Defendant's Motion for Reconsideration. See,

App at 32a-35a. MRE 705 was not raised at this level because the argument focused on discovery and MRE 6.201 and MCL 767.94a. MRE 705 was raised by the prosecutor in its response to Paul Phillips' Appeal.

The wording of MRE 705 does not mention "opinions". The rule allows for the establishment of the "underlying facts or data" either immediately before testimony or through disclosure on cross-examination. The cases interpreting the application of the rule have focused on disclosure immediately before testifying or disclosure on cross-examination. Compare: People v Pickens, 446 Mich 298; 521 NW 2d 797 (1994); and People v Peach, 174 Mich App 419; 437 NW 2d 9 (1989). The rule allows the Trial Court the authority to regulate testimony at trial and does not provide for expansion of pre-trial discovery that has been formalized in MCR 6.201.

V. THE TRIAL COURT IMPROPERLY DETERMINED GOOD CAUSE EXISTED PURSUANT TO MCR 6.201(I)

Throughout this Appeal, the Plaintiff/Appellant has claimed that "repeated discovery violations" existed and were the basis for the Trial Court's Order. A review of the record in this matter establishes that no such discovery violations were present.

On February 28, 2000, Plaintiff filed a Request for Discovery requesting:

> "1. The name and address of each witness other than the defendant whom the defendant intends to call at trial.
> 3. A copy of any written or recorded statement by a lay witness whom the defendant intends to call at trial.
> 3. Any report of any kind produced by or for an expert witness whom the defendant intends to call at trial.
> 4. Any document, photograph, paper or tangible object that the defendant intends to offer in evidence." See, App at 7a-8a.

This document did not request the creation of expert reports not in existence but rather, requested various items of information and documentation that currently existed. At the time of Plaintiff/Appellant's Request for Discovery, no "report of any kind" existed "by or for" any of Phillips' experts. The Preliminary Examination was held on February 3, 2000 and the transcript from the hearing was not available until June 21, 2000. No "opinion" of any kind could have been formulated until after this date. The May 15, 2000 Order of the Trial Court did not determine that Paul Phillips failed to produce any item requested but rather, required production or any and all reports created by Defendant's experts. This Order also required the productiond of lay witness addresses 30 days after the filing of the preliminary examination transcript. See, App at 11a. The issue of the creation of reports was not raised or considered in Plaintiff's Motion in May of 2000, thus, no ruling was made on this issue.

Records available in the Trial Court demonstrate that on March 28, 2000, Plaintiff responded to the People's initial request for discovery in the response Paul L. Phillips listed six lay witnesses, noting the town where those witnesses resided (specific addresses were not

available) and listed two experts, Richard Toner and David Schneider and provided addresses for those experts. See, App. at 4b-5b. Thus, as of April 3, 2000, the Prosecutor had been provided the address for the experts that are involved in this appeal. Prior to the filing of Plaintiff/Appellant's "Motion to Strike" in August of 2000, the Defendant's Second Response to People's Request for Discovery was filed. See, App. at 8b-9b. This response was filed prior to the filing of the People's motion and provided complete addresses for the lay witnesses listed earlier, repeated the address for experts Toner and Schneider, and listed Martin Schindling, Ph.D., providing an address. This filing missed the Trial Court's filing deadline by seven days, but this fact was not raised by any party or by the Trial Court during the hearing. Plaintiff/Appellant did not argue in its Motion to Adjourn Trial or Motion to Strike that a discovery problem existed regarding the listed witnesses. At the hearing, the only mention of lay witnesses would suggest that the investigating officers had contacted all of the lay witnesses listed by Mr. Phillips prior to the time of the hearing. See, App at 28a. It appears from the record, that providing witness addresses seven days late had absolutely no impact on the Plaintiff/Appellant's ability to conduct discovery or prepare for Trial. As noted above, the Prosecutor had been provided the addresses for the experts whose opinions are involved in this appeal as early as April 3, 2000.

In the Trial Court's Opinion and Order regarding good cause, "good cause" was found to allow modification of MCR 6.201(A). MCR 6.201(I) does not define "good cause" to be a "legally sufficient reason" for modifying the provisions of MCR 6.201(A(3). The "facts" upon which found that "good cause" existed were that Phillips had ailed to produce measurements, photographs and expert witness addresses as required by MCR 6.201(F). See, App. at 46a-47a. A review of the Trial Court's record and the hearing of September 9, 2000 does not support the Trial Court's determination.

A review of the documents contained in the lower Court's file demonstrates that expert witness addresses were provided to the Prosecutor in early April of 2000. This was before the May 15, 2000 Order was issued. See, App. at 4b-5b. The August 25, 2000 Motion to Adjourn Trial did not mention witness addresses as a reason to adjourn Trial or that the lack of witness addresses caused any concern. See, App. at 1b-3b. With regard to photographs and measurements, the record demonstrates that no effort was made to determine if the photographs were intended to by used at Trial (and thus, within the terms of mandatory discovery). It is clear from the record that the measurements had not been reduced to writing. This record does not support the Trial Court's findings. Finally, this record does not support the Trial Court's modification of MCR 6.201(A)(3). Clearly, an order to produce the measurements or photographs intended for use at Trial (the date of which had already been moved to an unknown date in the future) would have related to the only questions raised by the record. The Trial Court abused its discretion by compelling the creation of expert reports by Paul Phillips' attorney and the Court of Appeals decision should be affirmed.

RELIEF REQUESTED

For the reasons set forth above, Defendant/Appellant Paul Lewis Phillips, Jr., would request that this Court affirm the decision of the Court of Appeals.

Dated: October 22, 2002

BY:_____
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